

## § 230.156

## 17 CFR Ch. II (4–1–02 Edition)

(i) The size and nature of the private offering;

(ii) The date on which the issuer abandoned the private offering;

(iii) That any offers to buy or indications of interest given in the private offering were rejected or otherwise not accepted; and

(iv) That the prospectus delivered in the registered offering supersedes any offering materials used in the private offering; and

(4) The issuer does not file the registration statement until at least 30 calendar days after termination of all offering activity in the private offering, unless the issuer and any person acting on its behalf offered securities in the private offering only to persons who were (or who the issuer reasonably believes were):

(i) Accredited investors (as that term is defined in § 230.501(a)); or

(ii) Persons who satisfy the knowledge and experience standard of § 230.506(b)(2)(ii).

(c) *Abandoned registered offering followed by a private offering.* An offering for which the issuer filed a registration statement will not be considered part of a later commenced private offering if:

(1) No securities were sold in the registered offering;

(2) The issuer withdraws the registration statement under § 230.477;

(3) Neither the issuer nor any person acting on the issuer's behalf commences the private offering earlier than 30 calendar days after the effective date of withdrawal of the registration statement under § 230.477;

(4) The issuer notifies each offeree in the private offering that:

(i) The offering is not registered under the Act;

(ii) The securities will be “restricted securities” (as that term is defined in § 230.144(a)(3)) and may not be resold unless they are registered under the Act or an exemption from registration is available;

(iii) Purchasers in the private offering do not have the protection of Section 11 of the Act (15 U.S.C. 77k); and

(iv) A registration statement for the abandoned offering was filed and withdrawn, specifying the effective date of the withdrawal; and

(5) Any disclosure document used in the private offering discloses any changes in the issuer's business or financial condition that occurred after the issuer filed the registration statement that are material to the investment decision in the private offering.

[66 FR 8896, Feb. 5, 2001]

### § 230.156 Investment company sales literature.

(a) Under the federal securities laws, including section 17(a) of the Securities Act of 1933 (15 U.S.C. 77q(a)) and section 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. 78j(b)) and Rule 10b–5 thereunder (17 CFR part 240), it is unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, to use sales literature which is materially misleading in connection with the offer or sale of securities issued by an investment company. Under these provisions, sales literature is materially misleading if it: (1) Contains an untrue statement of a material fact or (2) omits to state a material fact necessary in order to make a statement made, in the light of the circumstances of its use, not misleading.

(b) Whether or not a particular description, representation, illustration, or other statement involving a material fact is misleading depends on evaluation of the context in which it is made. In considering whether a particular statement involving a material fact is or might be misleading, weight should be given to all pertinent factors, including, but not limited to, those listed below.

(1) A Statement could be misleading because of:

(i) Other statements being made in connection with the offer of sale or sale of the securities in question;

(ii) The absence of explanations, qualifications, limitations or other statements necessary or appropriate to make such statement not misleading; or

(iii) General economic or financial conditions or circumstances.

(2) Representations about past or future investment performance could be misleading because of statements or omissions made involving a material fact, including situations where:

(i) Portrayals of past income, gain, or growth of assets convey an impression of the net investment results achieved by an actual or hypothetical investment which would not be justified under the circumstances; and

(ii) Representations, whether express or implied, about future investment performance, including:

(A) Representations, as to security of capital, possible future gains or income, or expenses associated with an investment;

(B) Representations implying that future gain or income may be inferred from or predicted based on past investment performance; or

(C) Portrayals of past performance, made in a manner which would imply that gains or income realized in the past would be repeated in the future.

(3) A statement involving a material fact about the characteristics or attributes of an investment company could be misleading because of:

(i) Statements about possible benefits connected with or resulting from services to be provided or methods of operation which do not give equal prominence to discussion of any risks or limitations associated therewith;

(ii) Exaggerated or unsubstantiated claims about management skill or techniques, characteristics of the investment company or an investment in securities issued by such company, services, security of investment or funds, effects of government supervision, or other attributes; and

(iii) Unwarranted or incompletely explained comparisons to other investment vehicles or to indexes.

(c) For purposes of this section, the term *sales literature* shall be deemed to include any communication (whether in writing, by radio, or by television) used by any person to offer to sell or induce the sale of securities of any investment company. Communications between issuers, underwriters and dealers are included in this definition of sales literature if such communications, or the information contained therein, can be reasonably expected to be communicated to prospective investors in the offer or sale of securities or are designed to be employed in either

written or oral form in the offer or sale of securities.

(Sec. 38(a) (15 U.S.C. 80a-37(a)); sec. 19(a) (15 U.S.C. 77s(a)); secs. 10(b) and 23(a) (15 U.S.C. 78j(b) and 78w(a)))

[44 FR 64072, Nov. 6, 1979]

#### **§ 230.157 Small entities under the Securities Act for purposes of the Regulatory Flexibility Act.**

For purposes of Commission rulemaking in accordance with the provisions of Chapter Six of the Administrative Procedure Act (5 U.S.C. 601 *et seq.*), and unless otherwise defined for purposes of a particular rulemaking proceeding, the term *small business* or *small organization* shall:

(a) When used with reference to an issuer, other than an investment company, for purposes of the Securities Act of 1933, mean an issuer whose total assets on the last day of its most recent fiscal year were \$5 million or less and that is engaged or proposing to engage in small business financing. An issuer is considered to be engaged or proposing to engage in small business financing under this section if it is conducting or proposes to conduct an offering of securities which does not exceed the dollar limitation prescribed by section 3(b) of the Securities Act.

(b) When used with reference to an investment company that is an issuer for purposes of the Act, have the meaning ascribed to those terms by § 270.0-10 of this chapter.

[47 FR 5221, Feb. 4, 1982, as amended at 51 FR 25362, July 14, 1986; 63 FR 35514, June 30, 1998]

#### **§ 230.158 Definitions of certain terms in the last paragraph of section 11(a).**

(a) An “earning statement” made generally available to securityholders of the registrant pursuant to the last paragraph of section 11(a) of the Act shall be sufficient for the purposes of such paragraph if:

(1) There is included the information required for statements of income contained either:

(i) In Item 8 of Form 10-K and Form 10-KSB (§ 249.310 of this chapter), part I, Item 1 of Form 10-Q and Form 10-QSB (§ 249.308a of this chapter), or rule 14a-3(b) (§ 240.14a-3(b) of this chapter) under the Securities Exchange Act of 1934;